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Supreme Court of the United States

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~~IN VACATION~~

No. 3071

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PERRY PUBLICATIONS, INC.
PALM BEACH POST-TIMES AND
PENSACOLA NEWS JOURNAL DIVISIONS
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is printed in the Appendix hereto (App. A-1).[1]

[1] References to the Appendix are hereinafter designated "App." References to the Official Record of the proceedings in this case are designated "R", and references to material contained in the Joint Appendix below are designated "J.A."

JURISDICTION

1. The opinion of the Court of Appeals was entered on March 27, 1967, in the United States Court of Appeals for the Fifth Circuit (App. A-1). An Order denying rehearing was filed on or about May 25, 1967. Petition for Stay of the Decree of the Court of Appeals was filed on May 29, 1967, and was denied by Order of the Court of Appeals on June 20, 1967 (App. A-25). Upon denial of the Petition for Stay the Court of Appeals entered a decree enforcing the Order of the National Labor Relations Board (App. A-26). Petition for Stay of the decree, or execution of the decree, of the Court of Appeals was mailed to the Supreme Court of the United States on June 23, 1963, addressed to the Honorable Hugo L. Black, Associate Justice of the Supreme Court (App. A-28). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(i). The jurisdiction of the United States Court of Appeals in this cause was invoked under Section 10(e) of the National Labor Relations Act, as amended (61 Stat 136, 73 Stat 519, 29 U.S.C. Section 151 et seq.).

QUESTIONS PRESENTED

FINDINGS OF THE TRIAL EXAMINER AS TO FACT AND LAW WHICH WERE ACCEPTED.

1. The findings of the Trial Examiner and the Board were not based on substantial evidence contained in the record considered as a whole, but were based upon evidence which was improperly considered, inadequately developed, and without substantial basis in fact. Therefore, the Order of the Board was not entitled to enforcement by the Court of Appeals and the Court of Appeals committed reversible error in ordering enforcement of the said Order.

2. Throughout the course of the proceedings before the National Labor Relations Board and the United States Court of Appeals, the Petitioner has been consistently denied due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States, in that:

(a) Cases involving two distinct and separate divisions of the Petitioner, Perry Publications, Inc., were improperly consolidated for hearing and were heard jointly in spite of the fact that the conditions and circumstances surrounding the separate cases were highly dissimilar and unconnected.

(b) Petitioner's repeated Motions for severance of the two cases and for separate hearings were uniformly and constantly denied.

STATUTES INVOLVED

The pertinent statutory provisions involved in this case are set forth in the Appendix at page A-32.

STATEMENT OF THE CASE

This case originally came before the Court of Appeals on the Petition of the National Labor Relations Board to enforce an Order of the Board which found the Petitioner herein guilty of having committed certain unfair labor practices at the Palm Beach Post-Times and Pensacola News Journal Divisions (R 205-214, 244-246). Specifically, the National Labor Relations Board found, *inter alia*, that the Petitioner violated Section 8(a)(5) and Section 8(a)(1) of the National Labor Relations Act by failing and refusing to bargain collectively and in good faith with the West Palm Beach Local 709 (hereinafter referred to as Local 709), and Pensacola Local 293 (hereinafter referred to as Local 293),

of the International Typographical Union, AFL-CIO (hereinafter referred to as the Union). The Board further found that the Petitioner herein engaged in, and continues to engage in, unfair labor practices within the meaning of Sections 8(a)(3) and 8(a)(1) of the Act, by discriminating in regard to hire and tenure certain of its employees and by interfering with, restraining and coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

The Petitioner, Perry Publications, Inc., owns and operates several newspapers within the State of Florida (R.122-123), two of which are directly involved in this case. The Palm Beach Post-Times and the Pensacola News Journal Divisions are, and since July 1, 1962, have been, separate divisions of Perry Publications, Inc., (R 123). On November 30, 1960, the agreement between the Palm Beach Post-Times and Local 709 expired by its own terms and the parties to that agreement entered into negotiations on a new contract (R.23). In the period of time between the commencement of negotiations and January, 1963, many changes and innovations were introduced in the operations of the Palm Beach Post-Times, which resulted in the use of such newly developed devises as photocomposing machines and computers (R.126-127). These devices were introduced into the Palm Beach Post-Times operations to consolidate expenses and to simplify the many time consuming facets of newspaper operations (R.126-128). The utilization of these machines required certain personnel adjustments among employees working at the time use of the machines began and required the hiring of new personnel qualified to perform the duties incident to the operation of the new equipment (R.128-131). New job classifications were, of necessity, created for these new employees (R.128-131).

During the time between the expiration of the old contract between Perry Publications, Inc., and Local 709, many bargaining sessions were held between the parties, dealing with the many problems of union-management relations, but as of January 23, 1963, no agreement had been reached between the parties (R. 126-127, 131).

After January 23, 1963, a dispute arose between the Palm Beach Post-Times and Local 709 concerning union jurisdiction over the new employees who were working in job classifications created by the operation of the newly installed equipment mentioned above (R. 132). The Petitioner herein maintained that these new employees and their respective job classifications were not within the Union's jurisdiction, there having been no mention of them in the previous contract between the parties which had been signed well in advance of the time at which the new job classifications came into existence, (R.126). After extended bargaining on this question the Petitioner acceeded to Union jurisdiction over the new job classifications and provided the Union with information concerning these job classifications (R.149).

Also, during this time several employees of the Palm Beach Post-Times were either discharged, laid-off, or disciplined by the Petitioner in what the Union considered a discriminatory manner (R.133-137). Without exception these actions were taken as a result of continued incompetence, violations of company policy, refusal to work, or other improper behavior on the part of the affected employees (R.184, 185, 187, 167-168, 173-174, 198). These various actions on the part of the Petitioner were made the subjects of grievance procedures and were discussed by the parties during negotiations (135-138).

On September 30, 1963, the contract between the Pensacola News Journal and Local 293 expired on notice given by each party (R.139, J.A.62-65), and negotiations totally separate and distinct from those being carried on at the Palm Beach Post-Times were begun (R.139). These negotiations remained separate from those conducted at the Post-Times until shortly before the strikes against the Post-Times and the Pensacola News Journal began and even after the strikes commenced separate bargaining sessions were held.

On November 3, 1963, the two local Unions held meetings and passed identically worded strike resolutions, with only necessary changes in the names, against the Post-Times and the Pensacola News Journal, respectively (R.147). Chronologically, the agreement between the Palm Beach Post-Times and Local 709 concerning jurisdiction of the Union over the new job classifications occurred subsequent to the passage of the strike resolutions. The resolution of the jurisdictional disputes led the Unions to take the position that no disagreement whatsoever existed between the parties, (J.A. 789). The resolution of the jurisdictional question, according to Union representatives, left only economic issues undecided (J.A. 789).

On November 6, 1963, the Petitioner submitted to Local 709, a proposal dealing with graduated wage scales for employees in the new job classifications, which wage scales were made necessary by the very nature of the jobs involved, (R.150-151). No agreement was reached on this wage scale proposal and on November 9, 1963, both Local 709 and 293 went out on strike, (R.153-154). The record reveals that at the time Locals 709 and 293 went out on strike the only issues between the parties to the negotiations which were left unresolved were issues of a purely economic nature (R.153, J.A.809).

~~This being so, the strikes against the Pensacola News Journal and Palm Beach Post-Times were economic strikes and in violation of Section _____ of the Act (App. _____).~~ The record contains evidence offered by the General Counsel which shows that the strikes were called in support of contract demands (J.A.270). Since the time of the strike every Union request for a meeting has been accepted and the Petitioner has never refused to meet with the Union (J.A.810).

Changes alleging separate and distinct violations of the Act were filed against each of the two divisions of Petitioner, Perry Publications, Inc., by the local unions at each paper, (R.9, 22, 41, 47). The Board issued complaints on these charges and ordered the cases consolidated for hearing (R.53). The Petitioner moved, at the earliest possible date to sever the cases and for separate hearing (R.75-77), and this Motion was denied (R.81-84). At the outset of the actual hearing the Petitioner renewed its motion to sever and presented argument on its Motion (J.A.5, et seq.). The Motion was denied (J.A.10). As a result the two cases were heard jointly and an Order of the National Labor Relations Board was entered on March 24, 1965, finding the Petitioner guilty of the unfair labor practices specified hereinabove (App. A-6).

On approximately January 26, 1966, the Board filed a petition for enforcement of an Order of the National Labor Relations Board, which the Petitioner answered, praying that enforcement be denied. On March 27, 1967, the United States Court of Appeals for the Fifth Circuit filed its opinion in this case and ordered enforcement (App. A-1).

Petitioner herein timely filed a Petition for Rehearing with the United States Court of Appeals, which Petition was denied (App. A-21). On May 29, 1967,

Petitioner filed a Motion for Stay of the Decree in the Court of Appeals (App. A-22), and this Motion was denied by order of the Court of Appeals on June 20, 1967 (App. A-25). Petition for Stay of the Order of the Court of Appeals has been filed with the Supreme Court of the United States (App. A-28).

REASONS FOR GRANTING WRIT

1. ORDER OF THE BOARD IS WITHOUT SUBSTANTIAL BASIS IN FACT CONTAINED IN THE RECORD CONSIDERED AS A WHOLE, AND THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY ORDERING ENFORCEMENT.

It is a matter of settled law that, generally, the findings of the Trial Examiner and the Board as to the facts of a case and the credibility of witnesses are to be accepted by the Court on review. The law does not afford these findings of fact and credibility total immunity from question, however, nor does the law prohibit the refutation of such findings when the case requires, as was made abundantly clear in *Universal Camera Corp. vs. NLRB*, 34 US 474, 95 L.Ed. 456. This Honorable Court, in the *Universal Camera* case, stated, *inter alia:*

> "We do not require that the Trial Examiner's findings be given more weight than in reason and in light of the judicial experience they deserve . . .".

The Court further stated:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly significant of the requirement in both statutes that Courts consider the whole record . . ." . . . Congress has merely made it clear that a reviewing Court is not barred from

setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial when, viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view."

The position taken by the Supreme Court in the *Universal Camera* case, supra, has been restated in many cases and can no longer be questioned. *National Labor Relations Board vs. Elias Brothers, Big Boy, Inc.*, 327 F 2d 421 (CA 6, 1964); *National Labor Relations Board vs. Great Atlantic and Pacific Tea Company, Inc.*, 346 F 2d 936 (CA 5 1965); *National Labor Relations Board vs. Arkansas-Louisiana Gas Company*, 333 F 2d 709 (CA 8, 1964); *National Labor Relations Board vs. Local 776, (IATSE Film Editors)*, 303 F 2d 513 (CA 9, 1963).

In accordance with the line of cases cited above, the Petitioner urged the Court of Appeals, in its Brief to that Court, to reject the fact and credibility findings of the Trial Examiner on the grounds that these findings were replete with errors and were based on evidence of an insubstantial nature, (App. A-8). Patently erroneous findings, with no basis in substantial evidence, were made in connection with the Petitioner's alleged refusal to bargain, the jurisdictional dispute between the Petitioner and the Local Unions and the allegedly discriminatory discharges (R.130, J.A. 84), *inter alia*. Moreover, much of the evidence which was accepted by the Trial Examiner and the Board was concerned with events which took place in the years 1960, 1961, and 1962. Section 10(b) of the Act specifically states, *inter alia:*

> "... Provided, that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and service of a copy thereof upon the person against whom such charge is made . . ." (App. A-41).

The meaning of this provision of the Act is clear to the effect that any actions, or any evidence of actions, which occurred more than six months prior to the issuance of the Company are irrelevant and immaterial and should have no effect on any complaint or the charges contained therein. It is inconsistent and an obvious contravision of the statutes, to allow material which cannot, itself, provide a basis for the issuance of a complaint to have more than slight effect on later actions where are the basis of a complaint. The Trial Examiner and the Board should have considered evidence of acts prior to the limitation period only as background evidence and should not have allowed it to be used as proof of alleged unfair labor practices.

The Petitioner submits that in the absence of a substantial basis in evidence contained in the record considered as a whole, the Court of Appeals was under no obligation to accept the findings of the Trial Examiner or Board, but was under a duty to deny these findings and to refuse enforcement of the Board's order. Review of the record in this case reveals the totally insubstantial nature of the evidence upon which the Trial Examiner and the Board relied in making the decision in this case. For this reason, the Petition for Writ of Certiorari should be granted, in order that substantial injustice to the Petitioner is not the result of the Court of Appeals' erroneous acceptance of the findings of the Trial Examiner and the Board.

Should this Petition for Writ of Certiorari be denied, the Petitioner will suffer great damage to its rights and will further suffer great damage to its property.

2. PETITTIONER HAS BEEN THROUGHOUT THE COURSE OF THE PROCEEDINGS, DEPRIVED OF DUE PROCESS OF LAW.

Throughout the course of the proceedings, the Petitioner has repeatedly raised the question of, and objected to, the deprivation of due process which it has suffered as the result of improper consolidation of the two separate cases involved in this matter, and the constant refusal on the part of the Board to sever the cases for separate hearings (R. 75-77, J.A. 5, App. A-11).

The original Order of the Board consolidating the cases instituted the denial of due process to the Petitioner by ordering the joint hearing of two cases, each of which are totally unrelated in time, parties and subject matter. Upon consideration of the record as a whole, it is obvious that the connection between the two cases is, at best tenuous, and arises only out of the fact that the two newspapers involved have common ownership. The record contains no evidence of any inter-relationship between the individual papers, but does contain positive evidence that the papers are autonomous, individual divisions of Perry Publicatitons, Inc., and that each controls and formulates its own labor policies and contracts, without regard to the other, (R.75, J.A. 5 et seq.). This being so, the Petitioner can comprehend neither the basis upon which the cases were consolidated, nor the basis upon which refusal to sever the cases were founded.

The Courts have long held that even if the findings and order of the Board are otherwise supported by substantial facts, such findings and orders are not entitled to enforcement if they are obtained without regard to due process of law. *National Labor Relations Board vs. Prettyman,* 117 F 2d 786 (CA 6, 1941). Further, it is unquestionably the duty of the Court on review of an order of the National Labor Relations Board, or any other administrative Board, to determine whether the proceedings of the Board by which the order was obtained comported with the requisites of due process of law, *National Labor Relations Board vs. Baldwin Locomotive Works,* 128 F 2d 39, (CA 3, 1942). The Court of Appeals, in its per curiam decision handed down in the instant case has not responded to, or in any way disposed of, the questions of due process raised by the Petitioner and in failing to do so the Court of Appeals has left unfulfilled its duty to examine the procedures and substance of the case and to insure due process of law to the Petitioner.

The Petitioner submits that the consolidation of these cases was an unreasonable, arbitrary and capricious exercise of the uncontrolled discretion granted to the Board to consolidate cases for hearing. (Rules and Regulations National Labor Relations Board Series 8, As Amended, Sections 102.82, 102.33, 102.72). The fact that power granted to the Board is uncontolled requires that any abuse of this power or any exercise of this power in a manner which is other than reasonable be rejected and given no effect, in order that the object of this power shall not be denied due process.

CONCLUSION

The Petitioner respectfully submits to this Honorable Court that it has been deprived of due process of law and that the Order of the Board was without substantial basis in fact and was not entitled to enforcement by the Court of Appeals.

WHEREFORE, the Petitioner respectfully prays this Court to grant its Petition for Writ of Certiorari and to reverse the Decree of the Court of Appeals.

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P. O. Box 3324
315 Madison Street
Tampa, Florida 33601
-Attorney for Petitioner-

CERTIFICATE OF SERVICE

The undersigned certifies that one (1) copy of Petitioner's Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit in the above captioned case has been served this day by Mail upon the following counsel at the addresses listed below:

Arnold Ordman, General Counsel
National Labor Relations Board
Washington, D. C. 20570

Harold A. Boire, Regional Director
National Labor Relations Board
Twelfth Region, Federal Office Building
Tampa, Florida

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HARRISON C. THOMPSON, JR. of
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Tampa, Florida 33601

—Attorneys for Petitioner—

Dated at Tampa, Florida,

this _____ day of June, 1967.

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23,357

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES AND PENSACOLA NEWS JOURNAL DIVISIONS,
Respondents.

Peition for Enforcement of an Order of the National Labor Relations Board, (Florida case.)

(March 27, 1967.)

Before PHILLIPS,* THORNBERRY and DYER, Circuit Judges.

PER CURIAM: This case is before the court on a petition to enforce an order of the National Labor Relations Board against Perry Publications, Inc., Palm

* Of the Tenth Circuit, sitting by designation.

Beach Post-Times and Pensacola News Journal Divisions.

On a consideration of the record as a whole, we are of the opinion that the factual findings and conclusions of the Board are supported by substantial evidence; that such findings and conclusions afford a proper legal basis for the Board's order; and that the record reflects no legal ground on which a denial of enforcement could be predicated.

We think it would serve no useful purpose to delineate the evidentiary facts reflected in four printed volumes of the record.

The order will be enforced.

Adm. Office. U.S. Courts—E. S. Upton Printing Co., N. O., La.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	NO. 23357
PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES and PENSACOLA NEWS JOURNAL DIVISIONS, Respondent.	)	

PETITION FOR REHEARING

The Respondent, Perry Publications, Inc., Palm Beach Post-Times and Pensacola News Journal Divisions, respectfully petitions this Honorable Court for a rehearing of the Petition for Enforcement of an Order of the National Labor Relations Board in the above-entitled cause, and in support of this Petition represents to the Court as follows:

1. The Order issued by the Board on March 24, 1965, which was directed to the Respondent, contained findings of fact and conclusions of law which were, in fact, incorrect, improper and which afforded no adequate basis for the issuance of the Order of the National Labor Relations Board. The record of the proceedings before the National Labor Relations Board reflects the patent conflicts and errors upon which the National Labor Relations Board founded its Order.

2. Throughout the course of the proceedings before the National Labor Relations Board, the Respondent has continuously been deprived of the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, in that:

(a) Cases involving the two divisions of the Respondent, Perry Publications, Inc., were improperly consolidated for hearing and were heard together, in spite of the fact that the conditions and circumstances surrounding each of the individual cases were highly dissimilar, as is abundantly clear from the evidence contained in the record of this matter, and despite the fact that the conditions and circumstances of the individual cases should not have had any effect on each other. Consideration of the record as a whole and the findings of the National Labor Relations Board, clearly shows that the individual cases did have a profound effect on each other, and on the decisions of the Board as it related to each case; and that as a result thereof the Respondent was denied a fair hearing and due process of law as to both cases.

(b) The Respondent's motions to sever the two cases were continuously and uniformly denied in the face of patent prejudice and injustice which resulted to the Respondent, which is clear from examination of the record in this matter.

3. As a result of the improper consolidation referred to above and the erroneous refusal to sever the cases the Respondent has suffered, and will continue to suffer, great prejudice to itself and, if the order of the National Labor Relations Board is enforced and the Respondent is denied rehearing of this matter, the Respondent will be deprived of a great amount of property without due process of law.

4. The decree of this Court ordering enforcement of the National Labor Relations Board Order is without substantial basis in fact contained in the record considered as a whole. The evidencce in the record contains such conflicts and uncertainty that it offers no basis for the issuance of a decree enforcing the order of the National Labor Relations Board and, indeed, offers no substantial basis in fact for the Order of the Board itself.

5. This Honorable Court has failed in its decree to answer the questions raised in the pleadings filed by the parties to this Petition in that the Court has made no determination as to whether or not the Respondent was denied due process of law during the proceedings before the National Labor Relations Board, which issue was raised by the Respondent in its Answer to Petition for Enforcement of an Order of the National Labor Relations Board, and which issue presented a serious constitutional question to the Court, which has gone unanswered.

6. Unless the Respondent is granted a rehearing on the questions involved in the above entitled cause, substantial prejudice will result to the Respondent as a result of the erroneous order of the National Labor Relations Board.

WHEREFORE, the Respondent respectfully petitions this Court for a rehearing of the questions involved in this matter.

Respectfully Submitted,

HARRISON C. THOMPSON, JR.
-Attorney for Respondent-

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 23,357

NATIONAL LABOR RELATIONS BOARD,
Petitioner

V.

PERRY PUBLICATIONS, INC.,
PALM BEACH POST-TIMES and
PENSACOLA NEWS JOURNAL DIVISIONS,
Respondent

BRIEF IN SUPPORT OF PETITION FOR REHEARING

1

STATEMENT OF THE CASE

This case originally came before the Court upon the petition of the National Labor Relations Board pursuant to section 10(e) of the National Labor Relations Act, as amended, (61 Stat. 136 73 Stat. 519, 29 USC, Section 151, et seq.). The National Labor Relations Board sought by its petition to secure enforcement of its order (R. 205, 214, 244, 246), [1] issued herein on March 24, 1965, against the Respondent, Perry Publications, Inc., (hereinafter referred to as the Respondent). The order and decision of the Board are reported at 151 NLRB 1030.

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[1] References to the official transcript of the record in this case are designated as "R". References to Joint Appendix are designated "J.A.".)

On March 27, 1967, this Court rendered its opinion in this matter and stated that:

> "On consideration of the record as a whole, we are of the opinion that the factual findings and conclusions of the Board are supported by substantial evidence, that such findings and conclusions effect a proper legal basis for the Board's order and that the record reveals no legal ground on which a denial of enforcement could be predicated."

Consequently, the order of the National Labor Relations Board was enforced.

On April 6, 1967, the Respondent filed with the Court its Motion for Extension of Time for Filing Petition for Rehearing, which Motion was granted by the Court on April 12, 1967, the Court giving the Respondent until May 1, 1967, to file its Petition for Rehearing. The Respondent's Petition for Rehearing is filed herewith.

II.

ARGUMENT

A. THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND THE FINDINGS OF FACT UPON WHICH IT IS BASED, ARE INCORRECT, IMPROPER AND HAVE NO SUBSTANTIAL BASIS IN FACT CONTAINED IN THE RECORD AS A WHOLE.

The Respondent submits that the order issued by the Board on March 24, 1965, which was directed to the Respondent, contained findings of fact and conclusions of law which were, in fact, incorrect, improper, and which afforded no adequate basis for the issuance of the order. The record of the proceedings of the National Labor Relations Board reflects the patent conflicts and errors upon which the National Labor Relations Board founded its order.

It is unquestioned that, generally, the findings of the Trial Examiner and the Board as to the facts of a case, and the credibility of witnesses, are to be accepted by the Court on review. However, the cases are clear to the effect that there is a definite limit beyond which the credibility findings of the Trial Examiner and the Board are not to be accepted, as was pointed out in the case of *Universal Camera Corp. vs. National Labor Relations Board,* 340 US 474, 95 L. Ed. 456, where the Court stated, *inter alia:*

> "We do not require that the Trial Examiner's findings be given more weight than in reason and in light of the judicial experience they deserve . . .".

Exceptions to the general rule have been recognized in many cases, including *National Labor Relations Board vs. Elias Brothers Big Boy, Inc.,* 55 LRRM 2404 (C.A. 6, 1964), and *National Labor Relations Board vs. Florida Citrus Canners Co-op,* 288 F. 2d 630 (C.A. 5, 1961). The Respondent urged the Court in its Brief filed

in the first hearing of this case, to reject the credibility findings of the Trial Examiner on the grounds that they contained broad conflicts and errors and that they were based on evidence improperly considered. The record reflects that the Trial Examiner almost uniformly rejected the evidence offered by the Respondent and accepted almost all of the evidence offered by the Petitioner. It hardly seems likely that none of the Respondent's evidence was entitled to any credibility by the Trial Examiner.

As an example of an instance in which the Board based findings on other than substantial evidence, the Respondent refers the Court to the Board's finding that the Respondent was guilty of a refusal to bargain in good faith with the Union, which finding was based, in part, upon the preliminary finding that the Respondent conditioned bargaining upon the withdrawal of charges or complaints pending before the Board, against the Respondent. The record shows that both the Union and the Respondent were fully aware that there was a complaint outstanding, at the time of the strike, it having been issued by the Regional Office of the Board in Tampa (R. 27); that the unfair labor practice charges which were the basis of the complaint were beyond the control of the parties and that before any final disposition of the cases could be made, approval of the Board would be necessary (J. A. 1345). Testimony from the international representative of the Union indicated that he was not sure whether he or the Respondent's labor relations consultant first referred to the Union attorney in connection with the withdrawal of charges (J.A. 84). Based upon this evidence the Board found that the Respondent conditioned bargaining upon withdrawal of the charges. The Respondent submits that this finding could not be made even by a wholesale acceptance of testimony offered against the Respondent, for even Union testimony does not support the finding. The Respondent would show the Court that such a finding was not justified in that the record shows that the Respondent's labor relations consultant was a man of extensive

experience and knowledge in the area of labor relations, a man who would never knowingly commit an act which he knew would result in prejudice to the Respondent. The skill of Respondent's labor relations consultant was a fact which was acknowledged by the Trial Examiner (R. 158-159; J.A. 703-706). It can easily be seen from the conflicts in the record that absent far more convincing proof than that contained in the record, the finding on the part of the Board was imprudent, and is not entitled to any weight by this Court.

Another obviously erroneous finding of the Trial Examiner is that West Palm Beach Local #709 had been claiming computer typists, programmers, and console operators since February 9, 1962 (R. 130). There is no evidence to support this finding, and there can be none because the computer which created the need for the jobs mentioned above was not installed in February of 1962, and there were no employees in these job categories at that time (J.A. 814, 838). These examples of erroneous and unsubstantiated findings on the part of the Board are shown to the Court merely to point out that the record of this case contains many such errors and unsubstantiated findings and that these findings have had a substantial effect on the decision of the Board, all to the prejudice and damage of the Respondent.

The Respondent restates its position that the Court is not, in this case, bound by the credibility findings of the Trial Examiner and further states that upon rehearing of this matter the Court will, from consideration of the record as a whole, discover the incredible nature of the findings of the Trial Examiner and the Board. Further, the Respondent believes that the Court will discover that the findings of the Trial Examiner should not be given any weight by the Court. The Court is not faced, in the instant case, with a mere example of isolated error on the part of the Trial Examiner, or the Board, which causes no damage to the parties to the action, but is faced with a case in which the entire basis

of the Board's order is replete with conflict and error. If a rehearing is not granted in this case and the Court decrees enforcement of the Board's order, the Respondent will be caused great damage and will be effectively deprived of its rights under law to a fair hearing.

B. DENIAL OF DUE PROCESS.

Throughout the course of the proceedings before the National Labor Relations Board, the Respondent has uniformly been deprived of the due process of the law which is guaranteed by the Fifth Amendment to the Constitution of the United States. This question of deprivation of due process has been raised by the Respondent many times during the course of this case, and was re-asserted by the Respondent in the original hearing of this case before the Court. The denial of due process arose out of two inter-related actions of the Board, and has continued until the present time.

The Respondent was denied due process by the original order of the Board which consolidated for hearing the two separate and distinct labor disputes which occurred at the individual divisions of the Respondent, Perry Publications, Inc., the Pensacola News Journal and the Palm Beach Post-Times. This consolidation of the cases was, in effect, a substantial denial of due process. This denial of due process continued when, after Motion on the part of the Respondent to sever the cases, the Board refused to so sever the two cases and refused to hear them independently of each other. This refusal to sever the cases constituted a continuing denial of due process to the Respondent.

The record considered as a whole and the findings of the Trial Examiner reflect that there was only a tenuous connection between the two cases, insofar as the labor problems were concerned. It is true that the two newspapers were, and are, owned by Perry Publications, Inc., but that is really the only connection between the two cases. The Respondent has repeatedly pointed out that the two papers had separate collective bargaining

contracts, different local unions and separate, individually formulated, labor relations policies. Moreover, the labor problems involved at each of the newspapers and the progress of negotiations concerning these problems, did not coincide in time or in subject matter. This being so, it is the Respondent's position that the individual papers were entitled to have their separate problems heard separately and, that by hearing the cases jointly, the Board necessarily and obviously confused the separate issues involved and exposed each of the papers to substantial prejudice, resulting from events which occurred at the other paper. The Respondent submits that the prejudice which resulted was so broad and of such a far reaching nature that it has resulted in a substantial denial of due process to the Respondent.

It is well established that even if the findings and the order of the Board are otherwise supported by substantial facts, they are not just and are not entitled to enforcement if they are obtained without due process of law. *National Labor Relations Board vs. Prettyman,* 117 F. 2d 786 (C.A.G. 1941). Further, it cannot be questioned that an important function of the Court, on review of an order of the National Labor Relations Board, is to determine whether the procedures of the Board by which the order was obtained comported with the requisites of due process of law. *National Labor Relations Board vs. Baldwin Locomotive Works,* 128 F.2d 39 (C A. 3, 1942).

The Court, in its per curiam decision handed down in the instant case, has not answered the questions of due process raised by Respondent and has further denied the Respondent due process by not so doing. The Respondent presented to the Court various questions of constitutional law which are of extensive significance in the area of labor relations. The regulations of the Board which permit consolidation of cases for hearing leave the matter of consolidation in the complete and uncontrolled discretion of the Board and place no limitation on this discretion. For the purposes of this case

the Respondent does not contest the constitutionality of such a delegation of unfettered power, but the Respondent does submit that, even if such power is possessed, it may only be exercised in a reasonable manner. Any application of the power which is unreasonable, arbitrary or capricious is tainted with illegality and unconstitutionality and obviously exceeds even the broadest interpretation which may be given such a power. A literal interpretation of the regulation enables the Board to consolidate, and hear jointly, cases and matters totally unrelated in time, substance or parties. It cannot be argued that any Court, on review, would allow such an application of this power to stand unremedied.

The Respondent contends that in the instant case the Board has exercised its descretion in an unreasonable, arbitrary and capricious manner and that it has gone beyond the reasonably implied scope of its authority, in ordering the cases consolidated. The Respondent urges this Court to re-examine the actions of the National Labor Relations Board and to recognize the abuse of authority which is so obvious from the record of this case, which abuse of authority has deprived the Respondent of due process of law throughout the course of these proceedings.

If rehearing is not granted in this matter, the practical effect will be the enforcement of an order of the National Labor Relations Board which was obtained without due process of law, in a manner which substantially denied to the Respondent its rights guaranteed by the Constitution of the United States. Further should rehearing not be granted, the Respondent will be deprived of a great amount of property without due process of law.

C. ORDER OF THE NATIONAL LABOR RELATIONS BOARD IS WITHOUT SUBSTANTIAL BASIS IN FACTS CONTAINED IN THE RECORD.

The order issued by the National Labor Relations Board on March 24, 1965, contained findings of fact and conclusions which were incorrect, improper and erroneous. The record of the proceedings before the Trial Examiner and the Board reveals the vast number of inconsistencies in the evidence presented. In spite of these conflicts, the Board issued its order and found the Respondent uniformly at fault. The record contains no substantial basis in fact upon which the findings of the Board could have been based.

The Respondent, in its answer to the Petition to the National Labor Relations Board for enforcement of the Board's order, raised the question of the improper and erroneous nature of the Boards findings and conclusions. Moreover, the Respondent, in its Brief to this Court opposing the Petition for enforcement, set forth several blatant examples of the inaccurate and erroneous findings of the Trial Examiner and the Board. Many of these findings were based upon evidence which was clearly inadmissible under Section 10(b) of the National Labor Relations Act, for purposes other than background evidence. It is clear, from the very nature of the findings, that such evidence did provide the basis for many findings of the Trial Examiner and the Board.

Nowhere in the record of this case are the conflicts and the evidence and the errors in the findings of the Trial Examiner explained, excused, or justified. It is the contention of the Respondent that these conflicts and errors cannot be explained or reconciled, and that unless such can be done, the findings cannot be reasonably interpreted to provide a basis for any order of the Board.

In the total absence of such explanation or justification the order and the findings upon which it is based are clearly erroneous and entitled to no credence by this Court.

The Respondent further suggests that the Court, before it decrees enforcement of the order, examine and evaluate the conflicts and errors contained in the record and either justify or explain their existence, and their effect on the decree of the Board, if possible or deny enforcement of the order of the Board. If these conflicts and errors cannot stand the light of examination, this Court has but one course which it can follow, and that is to deny enforcement to the order on the grounds that it is not supported by the weight of substantial evidence contained in the record as a whole.

It is clear that the provisions of Section 10(e) of the National Labor Relations Act which state that conclusions of the Board which are supported by substantial evidence on the record as a whole are conclusive, do not prevent the Court, upon review of the Board's order, from setting aside the order when it cannot concientiously find that the evidence upon which the decree is based is of a substantial nature. *United Wholesale and Warehouse Employees, Local 261, Retail Wholesale and Department Store Union, AFL-CIO vs. National Labor Relations Board,* 282 F.2d 824, (C.A.D.C., 1960). In determining whether or not the evidence upon which the Board's order is based is "substantial" the Court is bound to look not only to the evidence which lends support to the findings and conclusions of the Board, but must also look to the evidence which fairly detracts from the findings and conclusions of the Board. *National Labor Relations Board vs. International Union of Operating Engineers, Local #12, AFL,* 237 F.2d 670, certiorari denied 77 Sup. Ct. 666, 353 US 910, 1 L.Ed. 2d 664 (C.A. 9, 1956).

The Respondent urges the Court to grant the rehearing for which it has petitioned and submits to the Court that upon reconsideration of the record as a whole, it will find such extensive error and inconsistency in the findings and conclusions of the Board that enforcement of the Board's order will be denied.

D. COMPLETE ANSWERS TO ISSUES AND QUESTIONS RAISED BY THE PARTIES NOT GIVEN IN OPINION OF THE COURT.

The Court by entering a per curiam decision in this case has not given the parties full and complete answers to questions which were well pleaded by the parties and which were properly brought before the Court. The opinion rendered by this Court merely states that there are no legal objections to enforcement of the Board's order. The Respondent submits that there have been questions raised in this matter which are not susceptible to "Yes" or "No" answers but which require serious discussion and qualification. The most important of these questions is that of denial of due prcoess to the Respondent. As has been pointed out in this Brief, even if it is assumed that the order of the Trial Examiner and the Board are perfectly well supported legally and factually, they are not entitled to enforcement if procedural due process has been denied. *National Labor Relations Board vs. Prettyman,* 117 F.2d 786; *National Labor Relations Board vs. Baldwin Locomotive Works,* 128 F.2d 39 (C.A. 3 1942). The Respondent petitions this Court for Rehearing and urges the Court to consider anew and to answer all the questions raised by the parties to this action, in order that complete justice will be done and in order that the parties hereto will have a clear understanding of the matters and considerations upon which the Court based its decision.

E. SUBSTANTIAL PREJUDICE WILL RESULT TO RESPONDENT UNLESS REHEARING IS GRANTED.

It is clear from the record in this case that the Respondent has played, and continues to play, an important role in the publishing industry, being one of the leading advocates of the application of modern, scientific and technological advances to this industry. With the increased use of modern techniques, such as computers, the Respondent is faced with new and unique

labor relations problems which cannot be answered by old standards. Innovations made by the Respondent in its operations have created new job categories and have made it necessary for the Respondent to seek out employees with new aptitudes and new skills. The Respondent submits that the record in this case bears out the fact that it has, throughout the course of negotiations with the unions involved, attempted to bargain and work with the Unions in an effort to resolve the new problems which face both employer and employee. Rather than having failed to bargain in good faith, as found by the Board, Respondent was merely attempting to find some workable solution to these problems. For example, after agreement was reached between the parties as to the inclusion of console operators and computer typists within the bargaining unit, Respondent proposed that new journeymen classifications be established for these new jobs because of the different nature of the skills involved, (R. 152; C. A. 1355). The Union flatly refused this proposal and the Trial Examiner found that this indicated bad faith on the part of the Respondent, (R. 163, 166-167). This finding is patently unwarranted.

The Respondent urges the Court to reconsider the novel problems which are covered in this case and to realize that the Respondent is faced with new problems and new questions which must be given answers. The Respondent is confident that upon consideration of these problems the Court will find that the Respondent did not refuse to bargain in good faith, but that it made extensive and serious efforts to deal with problems and considerations never before faced by the Respondent or the Unions involved.

The decision of the Court in this case will have a broad effect on many industries which are now taking advantage of and applying new methods and techniques of operation, and the Respondent feels that the utmost consideration should be given to the questions involved.

Further, enforcement of the Board's order without rehearing will make it necessary for the Respondent to reinstate many former employees, who left their employment to go on strike against the Respondent for economic reasons, there not necessarily being jobs presently available for these people. If the Respondent is required to reinstate these striking employees, it will be exposed to great damage in the monetary sense, as well as great damage to its business as the result of the confusion and uncertainty which will result from the reinstatement process.

The Respondent cannot stress too strongly the novel nature of the facts and considerations involved in this case and the necessity for the reconsideration, on the part of the Court, of all the factors involved. Therefore, the Respondent strongly urges that rehearing be granted in this matter in order that the Respondent not be exposed to the prejudice and damage which will result from the enforcement of the Board's order.

III.

CONCLUSION

For the reasons advanced in this Brief, and the Respondent's Petition for Rehearing, the Respondent respectfully petitions this Court to consider the conflicts and errors contained in the record of this case and all those questions raised by the parties to this action, and to grant a rehearing of this matter to the end that complete justice will be done.

Respectfully submitted,

HARRISON C. THOMPSON, JR. of
SHACKLEFORD, FARRIOR, STALLINGS & EVANS
P. O. Box 3324, Tampa, Florida

AND:

DONALD W. BELVEAL of
SHACKLEFORD, FARRIOR, STALLINGS & EVANS
P. O. Box 3324, Tampa, Florida

—Attorneys for Respondent—

CERTIFICATE OF SERVICE

The undersigned certifies that one (1) copy of Respondent's Brief in Support of Petition for Rehearing in the above captioned case has been served this day by Air Mail upon the following counsel at the addresses listed below:

Arnold Ordman, General Counsel
National Labor Relations Board
Washington, D. C. 20570

Harold A. Boire, Regional Director
National Labor Relations Board
Twelfth Region, Federal Office Building
Tampa, Florida

J. R. Goldthwaite, Jr., Esquire
Adair, Goldthwaite & Stanford
1431 Candler Building
Atlanta, Georgia

HARRISON C. THOMPSON, JR. of
SHACKLEFORD, FARRIOR, STALLINGS & EVANS
711 Marine Bank Building
Post Office Box 3324
Tampa, Florida 33601

—Attorneys for Respondent—

Dated at Tampa, Florida,

this _____ day of April, 1967.

U. S. COURT OF APPEALS
FILED
MAY 25, 1967
EDWARD W. WADSWORTH, CLERK

[637]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23,357

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

PERRY PUBLICATIONS INC., PALM BEACH POST-TIMES AND PENSACOLA NEWS JOURNAL DIVISIONS,
Respondents

Petition for Enforcement of an Order of the National Labor Relations Board (Florida Case)

ON PETITION FOR REHEARING

Before PHILLIPS,* THORNBERRY and DYER, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

*Of the Tenth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	
PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES and PENSACOLA NEWS JOURNAL DIVISIONS, Respondent.	)	No. 23357

MOTION AND CERTIFICATE FOR STAY TO PERMIT APPLICATION TO SUPREME COURT FOR CERTIORARI

COMES NOW, the Respondent, PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES and PENSACOLA NEWS JOURNAL DIVISIONS, and moves the Court to enter an Order staying execution of the Decree in the above entitled case, because it is the bona fide intention of the Respondent to make proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, within ninety (90) days, as provided by the Rules of the Supreme Court of the United States, and as support hereof, Respondent incorporates the Certificate of his Counsel, Donald W. Belveal, of the law firm of Shackleford, Farrior, Stallings & Evans, Post Office Box 3324, Tampa, Florida 33601.

CERTIFICATE

I HEREBY CERTIFY that it is the bona fide intention of the Respondent to make application to the Supreme Court of the United States for a Writ of Certiorari within ninety (90) days, as provided by the Rules of the Supreme Court of the United States, and I believe that there is merit in its case, and that the Judgment of the United States Court of Appeals for the Fifth Circuit ought to be reversed by the Supreme Court of the United States.

DATED this 29th day of May, 1967.

DONALD W. BELVEAL, of
SHACKLEFORD, FARRIOR, STALLINGS & EVANS
P. O. Box 3324, Tampa, Florida 33601

Attorneys for Respondent

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	
PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES and PENSACOLA NEWS JOURNAL DIVISIONS, Respondent.	)	No. 23357

CERTIFICATE OF SERVICE

The undersigned certifies that one (1) copy of Respondent's Motion and Certificate for Stay to Permit Application to Supreme Court for Certiorari in the above captioned case has been served this 29th day of May, 1967, by United States Mail, upon the following counsel at the addresses listed below:

Arnold Ordman, General Counsel
National Labor Relations Board
Washington, D. C. 20570

Harold A. Boire, Regional Director
National Labor Relations Board
Twelfth Region, Federal Office Building
Tampa, Florida

J. R. Goldthwaite, Jr., Esq.
Adair, Goldthwaite & Stanford
1431 Candler Building
Atlanta, Georgia

DONALD W. BELVEAL, of
SHACKLEFORD, FARRIOR, STALLINGS & EVANS
P. O. Box 3324, Tampa, Florida 33601

—Attorneys for Respondent—

FILED
JUN. 20, 1967
EDWARD W. WADSWORTH, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23357

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES and PENSACOLA NEWS JOURNAL DIVISIONS,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board Sitting at Washington, D. C. (Florida Case).

Before PHILLIPS,* THORNBERRY and DYER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the Motion of Respondent for a Stay of the Execution of the Decree of Enforcement in this cause be, and the same is hereby, DENIED.

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*Of the Tenth Circuit,
sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	
PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES and PENSACOLA NEWS JOURNAL DIVISIONS, Respondent.	)	No. 23,357

DECREE

Before: Phillips,* Thornberry and Dyer, Circuit Judges.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Perry Publications, Inc., Palm Beach Post-Times and Pensacola News Journal Divisions, its officers, agents, successors, and assigns on March 24, 1965. The Court heard argument of respective counsel on March 14, 1967, and has considered the briefs and transcript of record filed in this cause. On March 27, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Respondent, Perry Publications, Inc., Palm Beach Post-Times and Pensacola News Journal Divisions, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

by /s/

Deputy Jun. 20, 1967

New Orleans, Louisiana

ENTERED: June 20, 1967

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*Of the Tenth Circuit, sitting by designation.

(ORIGINAL FILED - JUNE 20, 1967)

IN THE
SUPREME COURT OF THE
UNITED STATES

IN VACATION

NO. _____

PERRY PUBLICATIONS, INC.,
PALM BEACH POST-TIMES AND
PENSACOLA NEWS JOURNAL DIVISIONS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

APPLICATION FOR STAY OF EXECUTION AND ENFORCEMENT OF A DECREE OF THE UNITED STATES COURT OF APPEALS TO PERMIT APPLICATION FOR WRIT OF CERTIORARI

TO THE HONORABLE HUGO L. BLACK, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Your Petitioner, PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES and PENSACOLA NEWS JOURNAL DIVISIONS, respectfully presents this its application for an Order staying the execution and enforcement of the Decree of the United States Court of Appeals for the Fifth Circuit, rendered in the above case on June 20, 1967, a copy of which is attached hereto, marked Exhibit "A", for a reasonable time, under

the provisions of Section 2101(F) of Title 28, of the United States Code, to enable Petitioner to apply for, and obtain, a Writ of Certiorari in the Supreme Court of the United States. The grounds upon which said Petition for a Writ of Certiorari will be based are as follows:

1. The findings of the Trial Examiner and the National Labor Relations Board were not based on substantial evidence contained in the record of this case considered as a whole, but were based upon evidence which was improperly considered, inadequately developed, and without substantial basis in fact; the Order of the National Labor Relations Board was not entitled to enforcement by Decree of the United States Court of Appeals for the Fifth Circuit and that Honorable Court committed reversible error in decreeing enforcement of said Order of the National Labor Relations Board.

2. Throughout the course of the proceedings before the National Labor Relations Board and the United States Court of Appeals for the Fifth Circuit, the Petitioner has been consistently denied due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States, in that:

a. Two separate and distinct cases were improperly consolidated for hearing before the National Labor Relations Board and were heard jointly, in spite of the fact that conditions and circumstances surrounding the separate cases were highly dissimilar and unconnected; and

b. Petitioner's repeated motions for severance of the two cases, and for separate hearings, were uniformly and consistently denied;

all of which served to substantially and effectively deny the Petitioner due process of law.

3. The United States Court of Appeals for the Fifth Circuit failed in any way to answer or otherwise deal with questions of due process raised by the Petitioner in the proceedings before that Court, which failure, in itself, constituted a denial of due process to the Petitioner.

The reasons why a stay is deemed necessary are as follows:

1. Application to the United States Court of Appeals for the Fifth Circuit for stay of its Decree in this case, pending the filing of a Petition for Writ of Certiorari in the Supreme Court of the United States, was filed by the Petitioner herein on or about May 29, 1967, and was denied by the United States Court of Appeals for the Fifth Circuit on or about June 20, 1967. Copies of said Motion for Stay and the Order denying that Motion are attached hereto, marked Exhibits "B" and "C" respectively, and are incorporated herein by reference.

2. The Petitioner has the bona fide intention of filing a Petition for Writ of Certiorari in the Supreme Court of the United States within thirty (30) days from the date hereof, and believes that there is merit in its case and that the Decree of the United States Court of Appeals for the Firth Circuit should be reversed by the Supreme Court of the United States.

3. Unless the Petitioner is granted a stay of the Decree of the United States Court of Appeals for the Fifth Circuit, pending its filing of a Petition for a Writ of Certiorari in the Supreme Court of the United States, it will suffer grave and irreparable damage to its property and business.

Respectfully submitted,

/s/ Donald W. Belveal

DONALD W. BELVEAL, of

SHACKLEFORD, FARRIOR, STALLINGS & EVANS
Post Office Box 3324
Tampa, Florida 33601

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the foregoing Application for Stay of Execution and Enforcement of a Decree of the United States Court of Appeals to Permit Application for Writ of Certiorari has been served by air mail upon the parties listed below, this 23rd day of June, 1967:

Honorable Thurgood Marshall
Solicitor General
Department of Justice
United States of America
Constitution Avenue between 9th and 10th Streets
Washington, D. C. 20530

Arnold Ordman, General Counsel
National Labor Relations Board
Washington, D. C. 20570

/s/ Donald W. Belveal

Attorney

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has rea-

sonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft,

or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing, any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public

(including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date

thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of

the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged)

in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8(a) (3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).*

*Section 8(f) is inserted in the Act by subsection (a) of Section 705 of Public Law 86-257. Section 705(b) provides:

> Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution of application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

NATIONAL LABOR RELATIONS BOARD

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time

prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S.C., title 28, secs. 723-B, 723-C).

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271-301—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 307

PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES AND PENSACOLA NEWS JOURNAL DIVISIONS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–2) is reported at 375 F. 2d 118. The decision and order of the Board (R. 119–214, 241–246)[2] are reported at 151 NLRB 1030.

[1] West Palm Beach Typographical Union No. 709 and Pensacola Typographical Union No. 293 (affiliates of the International Typographical Union, AFL–CIO) filed the underlying charges in these proceedings and intervened before the court of appeals; they are therefore respondents here.

[2] "R." refers to the transcript of record (Volume I), and "J.A." to the joint appendix, in the court below.

JURISDICTION

The decision of the court of appeals issued on March 27, 1967 (Pet. App. A–1), a petition for rehearing was denied on May 25, 1967 (Pet. App. A–21), and a decree was entered on June 20, 1967 (Pet. App. A–26). The petition for a writ of certiorari was filed on June 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that the employer failed to bargain in good faith with the union, in violation of Section 8(a) (5) and (1) of the National Labor Relations Act, and discriminated against five employees in order to discourage union membership, in violation of Section 8(a) (3) and (1).

2. Whether the Board deprived the employer of due process of law by consolidating a case involving one of the employer's divisions with a case involving another division.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth on pp. A–32 to A–42 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. BARGAINING NEGOTIATIONS

Petitioner publishes both the Palm Beach Post-Times, whose composing room employees are repre-

sented by Local 709, and the Pensacola News Journal, whose composing room employees are represented by Local 293 (R. 122–123, 139; J.A. 10–11, 62–63, 705). Petitioner's principal labor relations representative at both papers is Labor Relations Consultant Lemons (R. 123; J.A. 703); International Representative Bingel is a principal representative for both Locals (J.A. 10–11, 63).

A contract between petitioner and Local 709 at the Post-Times expired in November 1960 (R. 123; J.A. 11). Between then and January 1963, the parties engaged in negotiations for, but failed to reach, a new agreement. During that period, petitioner acquired new, automated equipment to perform work previously performed by union journeymen on less sophisticated equipment (R. 125–129; J.A. 21–23, 27–29, 36, 362–363, 834–835, 911–914, 1026–1027, 1037, 1058). Although union journeymen were also able to operate the new equipment, petitioner hired, for this equipment, new, nonunion employees, to whom it assigned new job classification titles ("computer typists," "console operators," "photocomposer operations," and "offset preparatory employees") (R. 126–129, 132; J.A. 14–19, 24–26, 29–30, 40–41, 146, 148–149, 155–159, 327–330, 447–450, 452–453, 834–835, 838–840, 888–891). Moreover, petitioner sought to amend the "jurisdictional" clause in the expired contract, which defined the unit of employees represented by Local 709, so as to exclude

these new job classifications; Local 709 resisted this effort (R. 130–131; J.A. 43–48, 143–149, 888–892).[3]

Contract negotiations continued into 1963. On January 30, September 6, and October 24, 1963, Local 709 requested a list of all employees performing work within its jurisdiction, including those in the new job classifications; the October request also asked for the wage scales of those classifications (R. 132, 138, 141–142; J.A. 46–49, 238, 322–325, 1336, 1342–1343, 1432–1433). Petitioner refused to supply this information, on the ground that the new employees were not performing work within Local 709's jurisdiction (R. 132, 138, 142; J.A. 47–49, 238, 322–325, 846–850, 1337–1341, 1344). Although the jurisdictional issue was extensively discussed in bargaining sessions during this period (R. 131, 136, 141, 144; J.A. 23–30, 328–331, 322–326, 602–603, 1345, 1347–1348), petitioner's labor relations consultant, Lemons, refused to recognize Local 709 as bargaining representative for the new job classifications, stating that he reserved the right to decide when employees were in the bargaining unit and when they were not (R. 131, 136, 156; J.A. 322–326, 231–234, 23–30, 602–603, 1347–1348, 1562). Moreover, in June 1963, petitioner unilaterally reclassified certain machinists in the unit to a newly created job category, with a resulting loss of pay of $4.35 per week (J.A. 55–57; R. 134). When International Representative Bingel attempted to discuss the reclassi-

[3] To the extent that the foregoing events occurred prior to the six-month limitations period established by Section 10(b) of the Act, they were considered by the Board for background purposes only (R. 123–131). See *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411.

fication on Local 709's behalf, Lemons replied that the change was within "management's prerogative" (R. 135; J.A. 56). Finally, on October 22, Lemons told Local 709 that it would be impossible to negotiate a jurisdictional clause until unfair labor practice charges (which the Union had filed with the Board, see n. 4, *infra*) were withdrawn, or the Board had decided the jurisdictional issue (R. 141; J.A. 232–234).

Meanwhile, the contract between Local 293 and petitioner at the News Journal terminated on July 31, 1963 (R. 130; J.A. 62–63). At the first bargaining session, on October 16, Lemons advised Local 293 that new employees ("computer typists") would be hired to operate certain newly acquired automated machinery because petitioner did not consider this operation to be within Local 293's jurisdiction (R. 140; J.A. 197–199). When Local 293 questioned this assertion, Lemons replied that petitioner could not negotiate with Local 293 until the jurisdictional question had been determined by the Board on the charges which had been filed involving the Post-Times (R. 140; J.A. 198, 229).

By agreement, both Locals and petitioner met on October 28-31 in West Palm Beach, with one contract being discussed each morning and the other each afternoon (R. 142; J.A. 64–68, 238–239). Throughout these negotiations, Lemons maintained that petitioner could not negotiate the jurisdictional question with either Local until the Board had rendered a decision on the issue in the unfair labor practice case then pending against the Post-Times (R. 143; J.A. 65–67, 73, 78, 87). Lemons added that the contract with Local

293 would depend on petitioner's contract with Local 709 (R. 143; J.A. 67, 73–88). On October 31, Lemons stated that petitioner would not negotiate a contract with either Local until Local 709 dropped its unfair labor practice charges (R. 143–144; J.A. 81, 161, 207–208, 122). Although the Union pointed out that it could not guarantee that the Regional Director would dismiss the pending complaint, Lemons nevertheless stated that he wanted such a written guarantee from the Locals (R. 143–144; J.A. 81). At one point, Lemons requested the Locals to have the Board's Regional Office send an observer to "approve" the negotiations (R. 143; J.A. 249).

On November 1, the Locals submitted to Lemons a settlement proposal, which called for the execution of contracts covering both papers (R. 144–145; J.A. 85, 1345). Petitioner's counterproposal omitted reference to an agreement on collective bargaining contracts, petitioner again asserting that it would not negotiate a contract with either Local until all the unfair labor practice charges had been disposed of by the Board (R. 146; J.A. 89–90, 94–95, 1346). When Local 709's Vice-President Jensen (a discriminatee named in the charges) protested that petitioner's counterproposal for settlement of the claims of employees against whom the company had discriminated omitted back pay, Lemons withdrew the entire counterproposal and informed the Locals that, while he was now willing to accept their position on jurisdiction, he would require that all other issues be settled by the Board (R. 146; J.A. 91–92, 266). After International Representative Bingel assured Lemons

that the backpay issue was open to negotiation, Lemons reinstated petitioner's counterproposal, but stated that the Locals would have to secure dismissal of all pending unfair labor practice charges before petitioner would proceed to negotiate a contract (R. 146–147; J.A. 92, 96–100, 141, 142, 267).

On November 5, the parties agreed that all future meetings would be for the purpose of discussing contracts at both papers (R. 148; J.A. 210–211, 274–275). At that time, Lemons finally complied with Local 709's repeated requests for a list of the names and wages of employees in the four new job classifications; Lemons stated: "This will take care of our refusal to bargain charge." However, he again asserted that the Board would have to decide the pending unfair labor practice charges before petitioner could negotiate a contract (R. 149; J.A. 107–108, 271–272, 1349).

On November 6, the parties reached a full accord on a jurisdictional clause which included the four new job classifications (R. 149, 160–161; J.A. 112–113, 275, 286–288, 789). However, petitioner then insisted that the contract with the Post-Times employees contain provisions which had the effect of negating the agreement on the jurisdictional clause (R. 147, 150–152, 163; J.A. 81, 114–117, 121, 123–125, 191, 280, 806, 1349–1350, 1355–1356). When Bingel asked why petitioner's counterproposal related only to the Post-Times (R. 152–153; J.A. 125), Lemons replied that he could not discuss the News Journal contract because that contract and the jurisdiction of Local 293 were contingent upon

the Post-Times contract (R. 153; J.A. 125). Although the counterproposal included petitioner's first specific wage proposal in over two years of negotiations, Lemons stated that this was petitioner's "final proposal," and refused to engage in further negotiations (R. 152–153; J.A. 39–40, 125–126, 216–220, 138).

On November 9, Locals 709 and 293 called the employees out on strike. The membership of both Locals had previously authorized the strike because petitioner had conditioned bargaining upon a withdrawal of unfair labor practice charges filed with the Board. (R. 146–147, 153–154; J.A. 100–106, 208–210, 269–270, 1348, 1360–1361.)[4] The strike was still in progress at the time of the Board hearing in April and May 1964 (R. 153).

2. DISCRIMINATION AGAINST UNION MEMBERS

While the bargaining negotiations described above were occurring, petitioner engaged in acts of discrimination against individual union members. The facts concerning those incidents are as follows:

a. Jensen, Venis, and Highfield

In May 1963, Local 709 elected a new slate of officers who had campaigned on a platform of more aggressive unionism (R. 132–133; J.A. 315–319). The new officers promptly filed the unfair labor practice

[4] Local 709 first filed charges in July 1963; Local 293 filed additional charges on November 12, 1963; and, on December 12, 1963, both Locals filed further charges. On March 11, 1964, the General Counsel of the Board issued a consolidated complaint on all of the charges. Petitioner's motion to sever the case involving the Post-Times from that involving the News Journal was denied by the Trial Examiner. (R. 119–120, 81–84.)

charges noted above. Petitioner thereupon threatened to get rid of the "troublemakers" responsible for the charges, complained that the charges were "upsetting" it, and stated that, because a previous discharge of union adherents had not rid petitioner of the "troublemakers," it "was planning further house cleaning" (R. 133, 135; J.A. 60–61, 319–320, 655, 673–674).

Employee Jensen was one of the newly elected officers (R. 133; J.A. 60). Less than two weeks after his election, Jensen and others were unilaterally reclassified by petitioner, with a resulting wage decrease. Others who were affected quit their jobs, but Jensen accepted the reduction and attempted to correct it through the grievance procedure and collective bargaining (R. 134–135; J.A. 56–57). On Saturday, August 24, Foreman Calkins asked Jensen and union members Venis and Highfield to work overtime (R. 180–181; J.A. 339, 463, 489, 1237). All refused for personal reasons (R. 181; J.A. 342–343, 463, 489, 1175–1177). Calkins "accepted" the excuses tendered by Jensen and Venis, and did not comment about Highfield's refusal (R. 181; J.A. 339, 463, 489). Jensen and Venis pointed out that another employee still on duty when they left could fill in for them if necessary (R. 181; J.A. 339–342). The remaining employees were able to complete the work at about the usual hour (R. 192–194; J.A. 651–657, 662, 663, 1183–1190, 1207, 1123–1124, 512–520, 498–501, 341–342).

On Monday, August 26, during a grievance committee meeting, petitioner's representative, Lemons (who knew about the overtime incident) expressed irritation over the grievance activity of Jensen and

Local 709, but did not mention the refusal to work overtime (R. 136–137, 184; J.A. 343–349, 873, 875, 1556–1568). The next day, petitioner discharged Jensen and Venis on the asserted ground that they had refused "a direct order" to work overtime (R. 185, 348–351, 584, 1413, 1363). On September 11, the second day after her return from a two-week vacation, Highfield was told by Superintendent Dacus that he would "have to punish [her] in some way" for the overtime incident; and, he suspended her for one week (R. 187; J.A. 490–492). As a matter of policy and practice, petitioner does not require an employee to work overtime if he has an excuse which is deemed legitimate by the employee's immediate supervisor. Nor had any employee previously been disciplined for refusing to work overtime, regardless of the reason given. (R. 190–191; J.A. 465–466, 351, 392–394, 430–431, 422–433, 451, 452, 375, 499.)

b. Dulin

Dulin, a former officer of Local 709, was an employee with six and a half years of experience (R. 167; J.A. 539, 550). On April 21, 1963, Dulin—following established practice—attempted to clear a clogged aisle by pushing some wheeled tables which carried forms, each holding a page of set-up type (R. 168; J.A. 546–549). One of these forms fell off a table and the type became scrambled (*ibid.*). Three days later, petitioner discharged Dulin for "carelessness" (R. 169; J.A. 551, 1417–1418). The only other employee who had had a similar accident during Dulin's employment with petitioner had not been discharged (R. 171; J.A. 670–671, 550, 562). Dulin was replaced by a non-

union employee (R. 170; J.A. 568). Petitioner offered to reemploy Dulin in its composing room during the strike, but he refused to cross the picket line (R. 170; J.A. 1419).

c. Miller

In May 1963, Arnold, who then supervised the tape room night shift, predicted that petitioner was going to eliminate the remaining union members from the tape room operation (R. 174; J.A. 527–528, 621, 633). About the same time, petitioner arranged for a series of secret tests of the production rate of Miller, who was one of the few union members still employed in the tape room (R. 173–174; J.A. 618–620, 866–872, 1088–1089). The tests revealed what was already well known—that Miller was one of the slower workers, although she was a conscientious employee who produced very high quality work (R. 173–174; J.A. 526, 617, 625–626, 867–868, 1102, 1103). Thereafter, and on the heels of a threat that if Local 709 pressed its charges several Post-Times positions might be eliminated, petitioner discharged Miller, who had been employed for about 12 years, without any prior warning (R. 173; J.A. 522–523). Subsequent to Miller's discharge Arnold announced to the nonunion tape room employees that if they joined the Union "they would be fired" in accordance with "company policy" (R. 175; J.A. 634). During the strike, petitioner offered to rehire Miller in a nonunion job, but she refused (R. 243; J.A. 528, 1417).

d. Weymark

In June 1963, petitioner granted Weymark a leave of absence, with the understanding that he would return to work on September 9, when fellow compositor Palumbo began his vacation (R. 196–197; J.A. 563–586, 588–589, 905, 1187). Weymark returned to work as scheduled, but, when Palumbo finished his vacation, Weymark, a Local 709 member, was laid off while petitioner retained nonunion compositor Martin (R. 198; J.A. 588). Martin had been hired during Weymark's leave of absence, although Weymark had given petitioner a self-addressed envelope to recall him if he were needed prior to September 9 (R. 196–198; J.A. 585–588).

B. THE BOARD'S CONCLUSION AND ORDER

The Board found that petitioner violated Section 8(a) (5) and (1) of the Act by, *inter alia,* negotiating with a fixed intention to prevent the consummation of any agreement with either Local 709 or Local 293, and by insisting that it could not negotiate with the Locals while unfair labor practice charges were outstanding. The Board further found that petitioner's bad faith bargaining caused the November 1963 strikes and rendered them unfair labor practice strikes from their inception, and that therefore the strikers were entitled to reinstatement on request, regardless of replacement. (R. 155–167.) In addition, the Board concluded that petitioner laid off Weymark, suspended Highfield, and discharged Dulin, Miller, Jensen, and Venis, for anti-union reasons, in violation of Section 8(a) (3) and (1) of the Act (R. 172, 195, 242–243). Finally,

the Board found that petitioner made threats violative of Section 8(a)(1) of the Act (R. 242, 201).

The Board ordered petitioner, *inter alia,* to cease and desist from the unfair labor practices found; to offer reinstatement to the discriminatorily discharged employees; to make them and the other employees discriminated against whole for any loss of pay; to bargain with the Union in good faith; to reinstate the strikers on application regardless of replacements and to make them whole for any loss of pay; and to post appropriate notices (R. 205–212, 244–246.)

C. THE DECISION OF THE COURT OF APPEALS

Observing in a *per curiam* opinion that "it would serve no useful purpose to delineate the evidentiary facts reflected in four printed volumes of the record," the court of appeals held that the Board's findings and conclusions were supported by substantial evidence, and that no legal error was shown. Accordingly, the court enforced the Board's order in full (Pet. A1–A2).

ARGUMENT

1. Petitioner's challenge to the Board's unfair labor practice findings raises only evidentiary issues which do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, the facts summarized in the Statement (*supra,* pp. 2–12), show that the court of appeals was amply warranted in finding substantial record support for the Board's findings with respect to petitioner's unlawful discriminations and failure to bargain in good faith.

2. As shown in the Statement (*supra*, pp. 2–3), the Post-Times and the News Journal are divisions of a single corporate entity, petitioner Perry Publications, and the contract negotiations regarding both newspapers were conducted by Lemons for petitioner and Bingel for both Locals. Moreover, petitioner's insistence on conditioning execution of a News Journal contract upon the resolution of issues in connection with the Post-Times brought about joint negotiations; those negotiations covered issues common to both newspapers and stemmed from petitioner's plan for use of its automation devices at both newspapers (*supra*, pp. 3–7). Under these circumstances, it is clear that the Board did not abuse its discretion in consolidating the cases involving petitioner's newspapers. See *National Labor Relations Board* v. *Local Joint Executive Board*, 301 F. 2d 149, 155–156 (C.A. 9). Nor has petitioner shown any prejudice to it by virtue of the consolidation.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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